SUPREME COURT, U. S.

Supreme Court, U.S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1971

No. 71-698

JAMES O. EVANS,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION OF THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

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No. _____

JAMES O. EVANS,

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DEPARTMENT OF TRANSPORTATION OF THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner James O. Evans respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 13, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 446 F.2d 821, and appears as Appendix A hereto. No opinion was rendered by the District Court for the Middle District of Florida; its Order and Judgment appears as Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 13, 1971 and appears as Appendix B hereto. A timely petition for rehearing was denied on September 2, 1971, the Order appearing as Appendix C, hereto. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Freedom of Information Act, 5 U.S.C. §552, requires disclosure of certain letters of allegation held by the Federal Aviation Administration concerning petitioner's fitness as a pilot;

(A) Where the "confidential informant" may be dead;

(B) Where the investigation was concluded over a decade in the past;

(C) Where the letters were written for the purpose of improperly influencing an arbitrator, and resulted in the destruction of petitioner's career.

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides:

> §552. *Public information; agency rules, opinions, orders, records, and proceedings.*
>
> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of this court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(b) This section does not apply to matters that are—

* * *

(3) specifically exempted from disclosure by statute;

* * *

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

* * *

Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. 1504, provides:

Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provision of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

STATEMENT OF THE CASE

From 1941 until April 15, 1960 petitioner James O. Evans, was employed by Pan American World Airways, Inc., as a co-pilot and captain. On April 15, 1960 Evans was fired by Pan American for reasons unspecified by the carrier.

Evans pursued his contractual and administrative remedies against his discharge, which resulted in the establishment of a System Board of Adjustment pursuant to the provisions of the Railway Labor Act. 45 U.S.C. §184.

Sometime in October, 1960, while the administrative procedures were in progress, and prior to a decision of the "neutral" arbitrator regarding the carrier's failure to specify charges against Evans and Evans' discharge, the Federal Aviation Administration received certain letters from a person or persons or an organization still unknown to Evans. (R. 10; App. 14-15). Petitioner believes and alleged that these letters were sent by officials of Pan American and that they contained false allegations regarding his mental fitness and abilities as a pilot.

As a result of these letters of allegations the Federal Aviation Administration summarily granted an emergency suspension of petitioner's medical certificate and required him to undergo psychiatric evaluation and testing to obtain its return. The conclusions from the favorable report of Philip B. Phillips, M. D., praising Evans for his "methodical, slow, thoughtful, conservative, conscientious approach", are contained in the doctor's affidavit. (R. 14; App. 16-18). In this conclusion Dr. Phillips specifies that:

"This patient is undergoing psychiatric evaluation at the request of the Federal Aviation Agency, which removed his medical certification in January, 1961, *as a result of certain actions taken by Pan American Air Lines*, for which the patient had worked as an airline captain for many years." (R. 14; App. 17).

After Pan American had obtained the suspension of Evans' medical certificate by the false allegations in these letters, it used the fact of this "psychiatric" suspension in order to improperly and fraudulently prejudice the arbitrator against Evans, by improperly advising the "neutral" arbitrator of the suspension. This course of conduct is clearly shown in the deposition of the attorney who represented Evans in the administrative hearing. (R. 8; p. 7). He described the "neutral" arbitrator's conduct as follows:

"Q. (By Mr. Horn) Did Wallen [the arbitrator] mention the lifting or the suspension of Captain Evans' medical certificate?

A. (Mr. Schy) Yes, that was one of the specific items that he mentioned with great emphasis.

Q. All right. Do you recall specifically what he said about that?

A. Yes, I do. He said that I knew as well as he that even the FAA knew that Evans wasn't fit to fly as an airline pilot, that the FAA had been so concerned about Evans' qualifications that they had jerked his certificate on a summary or emergency basis, which clearly indicated that they considered Evans to be some sort of nut.

I remember him using that word nut.

> Q. Did Wallen say who had advised him concerning the suspension of the certificate or as to the other matters that he related to you?
> A. I asked where he had gotten that information, as well as the other information about the other episodes that he described, and his answer to each such inquiry was 'never mind where I got it,' or—well, I think basically that is what he said, 'You just never mind where I got it; I got it,'" (R. 8, pp. 19-20).

At this time, of course, neither Evans nor his attorney knew what the origin of the "emergency psychiatric suspension" had been, (R. 8, p. 10), or how it had been instigated by Pan American in order to be improperly used against him in the arbitration proceeding. In the course of the arbitration proceedings the arbitrator ruled that precise charges would have to be made against Evans. Once these charges were made, however, the discharge was sustained and Evans career as a pilot was ruined.[1]

Subsequent to this time, Evans has sought to determine how this suspension came about. As a result of senatorial inquiry in 1962 he was initially advised that "an anonymous letter" had been received by the FAA. In 1964

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[1]The opinion of the Court of Appeals below contains a glaring factually incorrect statement that "[As a result of arbitration, Evans was also rehired by Pan American]", 446 F. 2d at 822, App. A hereto, p. 2. The record is plain on this point that Evans was *not* rehired and the respondent has not contended to the contrary. From this misapprehension of fact, the Court of Appeals opined that Evans' interest in this matter was confined to "personal curiosity", 446 F. 2d at 823, Appendix A, p. 5, rather than any more substantial interest. Although this was specifically brought to the Court of Appeals' attention on the Petition for Rehearing, the Court declined to even correct its opinion by deleting the inaccurate sentence.

he was advised by the General Counsel of the FAA that there was "no anonymous letter." (R. 4; App. 10). In 1966 he was finally advised that there were letters which were not anonymous, and in 1968 the Agency formally refused to comply with his request to obtain the letters under the Freedom of Information Act, 5 U.S.C. §552.

This suit was then filed to obtain disclosure of these letters. After the filing of an Amended Complaint (R. 3; App. 1-6), the defendant Department of Transportation filed its Answer (R. 4; App. 7-13) admiting the existence and its receipt and continued possession of the letters. The defendant then moved for a Summary Judgment based upon its claims of exemption from the Freedom of Information Act under certain specific provisions of the Act. (R. 9; App. 12). In an affidavit, the Administrator of the FAA claimed that the author of the letters in the initial letter, "indicates his concern about difficulties he might encounter if he names the pilot." (R. 10; App. 14). After alleged assurances, the author then wrote, naming the plaintiff, and making the false allegations.

In discovery, it was revealed that the FAA had had no further contact with the author of the letters since its receipt of them, *and that it had no idea whether the author was alive or dead at the present time.* (R. 19, 21; App. 20, 23-4).

The District Court ordered that the original letters be produced for an *in camera* inspection by the Court. (R. 20; App. 22-23). After the *in camera* inspection the District Court granted the defendant's Motion for Summary Judgment (R. 25; App. 24-25). On Motion for Rehearing filed by the plaintiff, the Court granted a re-

hearing, and after oral argument entered its Order and Judgment (R. 29; Appendix D hereto, p. 13) again granting defendant's Motion for Summary Judgment and dismissing the case. In this Order the Court specified two statutory exemptions from disclosure; 5 U.S.C. Section 552(b)(7), the "investigatory files" exemption, and 5 U.S.C. Section 552(b)(3), which exempts matter "specifically exempted by statute." In this connection the Court cited 49 U.S.C. Section 1504.

The Court of Appeals following argument and an *in camera* inspection of its own, affirmed, relying upon the same provisions. (Appendix A, p. 1-7).

REASONS FOR GRANTING THE WRIT

This case involves important and substantial issues arising under the Freedom of Information Act, 5 U.S.C. §552.

This Court has not, as yet, granted plenary review to any decision involving this statute. The fundamental issues of citizen access to government information which are presented in cases under the statute, however, are rapidly coming to the fore, frequently with explosive potential. E.g., *Committee for Nuclear Responsibility v. Seaborg*, 40 U.S. Law Week 2249 (D.C. Cir. October 28, 1971); Cf. *Committee for Nuclear Responsibility v. Seaborg*, 40 U.S. Law Week 2250 (D.C. Cir. November 3, 1971), *Committee for Nuclear Responsibility v. Schlesinger*, ____ U.S. ____, 40 U.S. Law Week 3214 (November 6, 1971).

The scheme of the statute is clear and straightforward. The Government is required upon proper request to produce "identifiable records * * * except as specifically stated in this section". 5 U.S.C. §§ 552(a)(3), (c). Judicial review of withholding from disclosure is to be "de novo and the burden is on the agency to sustain its action". 5 U.S.C. § (a)(3).

If the petitioner is correct in his belief that the letters sought to be discovered in the present case were, in fact, written by or at the direction of officials of Pan American World Airways, Inc., an enormous and flagrant misuse of the processes of governmental regulation will have occurred, cloaked heretofore in a veil of silence. The petitioner seeks the production of these letters in order to clear his name and to seek redress for the destruction of his reputation and career which has directly resulted from them. It is the belief of the petitioner that these letters were written by officials of Pan American for the purpose to which they were put, i.e., to falsely and materially prejudice a so-called "neutral" arbitrator by giving the impression reinforced by governmental action that the petitioner was mentally unfit to be a pilot. It is difficult to conceive a more devastating and destructive charge against an airline pilot than that of mental unfitness.

For years the government maintained a fiction of "anonymous" letters, then it denied the existence of letters, and only years after the event did it admit of the existence of signed letters and invoke a refusal to disclose them, when a proper request for these identifiable records was made.

This case presents an appropriate vehicle for this Court to resolve a number of conflicts in principle which have arisen in litigation under the Freedom of Information Act, and to give needed guidance to the federal courts in their interpretation of this vital statute.

Substantial litigation has taken place in the federal courts since the effective date of the statute,[2] involving the specific exemption from disclosure provision most frequently relied upon by the Government to justify its refusal to disclose information and relied upon by the Government here, 5 U.S.C. §552(b)(7). This exemption from disclosure applies to:

> "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

The Senate Committee Report, described the purpose of this exemption:

> "These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court." Senate Report No. 813 on S. 1160, 89th Cong., 1st Sess. at 9 (1965).

This statutory language and history has led to a line of decisions, with which the decision below clearly conflicts in principle. These decisions include *Bristol-Meyers v. Federal Trade Commission*, 424 F. 2d 935 (D.C. Cir.

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[2]July 4, 1967.

1970); *Wellford v. Hardin*, 444 F. 2d 21 (4th Cir. 1971); *Barceloneta Shoe Corporation v. Compton*, 271 F. Supp. 591 (D.P.R. 1967); and, *Cooney v. Sun Shipbuilding Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968).

In the *Bristol-Meyers* decision the Court of Appeals for the District of Columbia characterized the purpose of the exemption as "intended to limit persons charged with violations of the federal regulatory statutes to the discovery available to persons charged with violations of federal criminal law." 424 F. 2d at 939. Another decision to the same effect is *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 594 (D.P.R. 1967).

Throughout the case at bar, the Respondent Government has claimed that the author of the letters which are sought to be disclosed is a "confidential informant" whose communications the Government is privileged to shield. In *Roviaro v. United States*, 353 U.S. 53 (1957), however, the leading decision on disclosure of an informer's identity, this Court said:

> "The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of the informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.
>
> "FN8 — The record contains several intimations that the identity of John Doe was known to petitioner and *that John Doe died prior to the trial.*

> *In either situation, whatever privilege the Government might have had would have ceased to exist,* since the purpose of the privilege is to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct." 353 U.S. at 60. (Emphasis added).

The Government admitted in the District Court below (R. 21; App. 23-4) that it has made no attempt to contact the "informant" and has no idea whether the author is alive or dead. If he is dead there is no basis for the assertion of any "confidential informant" privilege.

The District Court's decision below was a Summary Judgment, which ignored the existence of a disputed issue of material fact, i.e., the life or death of the informant. If the author is dead, which petitioner believes, there is no basis whatever for the Government's assertion of privilege. The saving provision in the exemption for "investigatory files" allowing disclosure *"to the extent available by law to a party other than an agency,"* 5 U.S.C. §552(b)(7) would be plainly applicable. This analysis is in accordance with the Attorney General's published Memorandum on the Public Information Section of the Administrative Procedure Act (1967) at p. 38:

> "The effect of the language in exemption (7), on the other hand, seems to be confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants."

A second line of decisions with which the decision below conflicts in principle involves the invocation by the Government of the "investigatory files" exemption, over a decade after the purpose of the investigation has ceased to exist.

It was early held in analyzing this provision and its legislative history that:

> "First, a primary purpose of the exemptive provision in question is to avoid a *premature* disclosure of an agency's case when engaged in law enforcement activities. * * * Second, by its terms and tenor, the statute creates no new exemption for agency files; in the several exemptive provisions it merely recognizes and codifies the existing judicially and congressionally created exemptions." *Cooney v. Sun Shipbuilding & Drydock Company*, 288 F. Supp. 708, 709-10 (U.S.D.C. E.D. Pa. 1968). (Emphasis in original).

Similarly the Court of Appeals for the Fourth Circuit recently held in *Wellford v. Hardin* 944 F. 2d 21, 23, (4th Cir. 1971):

> "We agree with the district court that the legislative history of this exemption reveals that its purpose was to prevent premature discovery by a defendant in an enforcement proceeding. The reports of the House Government Operations Committee and the Senate Judiciary Committee define the purpose of the exemption as the protection of the government's case in court."

To the same effect is *Getman v. NLRB*, 40 U.S. Law Week 2126, 2127, (D.C. Cir., August 31, 1971). The Court of Appeals for the District of Columbia has also held in *Bristol Meyers v. FTC, supra:*

> " • • • the agency cannot, consistent with the broad disclosure mandate of the Act protect all its files with the label 'investigatory' and a suggestion that enforcement proceedings may be launched at some unspecified *future* date". 424 F.2d at 939 (Emphasis added).

Where, the events, as here, have taken place ten years in the past and the Government's proceedings are long since over, the application of the "investigatory files" exemption is plainly unwarranted and in conflict with the principles set out in the foregoing decisions, and with the legislative history of the statute.

The second exemption cited by the Court of Appeals below is contained in 5 U.S.C. §552(b)(3) which exempts from disclosure matters that are "specifically exempted from disclosure by statute." The statute which is said to "specifically" exempt these letters is 49 U.S.C. §1504.[3]

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[3] "Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board of the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress."

The Court of Appeals characterized the objections of the author stated in the initial letter as a "running, permanent objection to the disclosure". (App. A, p. 7, 446 F.2d at 824). Petitioner submits that by giving effect to such an objection, reaching probably beyond the grave, the Court of Appeals below has given undue weight to the governmental policy of concealment, particularly where, as here, governmental regulatory processes have been blatantly misused.

The government has in no manner specified how the disclosure of these letters would, "adversely affect the interests of such person", i.e., the author of the letters. As previously stated, it is plaintiff's belief that these letters were inspired by his former employer, Pan American, in order to materially and fraudulently affect his pending discharge proceeding. Any statutes of limitations for libel have long since expired as to the individual author of the letters. Possible adverse effects upon Pan American, which is neither the author of the letters nor the "person" who has allegedly objected to the disclosure, are *not* grounds under this statute to prevent disclosure.

Additionally a "public interest" in preventing the manipulation of the processes of governmental regulation for private ends is clearly discernible in this case. Disclosure of these letters *is* "required in the interest of the public" in order to right the monumental injustice which has pervaded the treatment of the plaintiff by his employer and by the government. The destruction of an individual's career and reputation in the manner described in the record of this case requires disclosure of these documents.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31092

JAMES O. EVANS,
Plaintiff-Appellant,

versus

DEPARTMENT OF TRANSPORTATION OF THE UNITED STATES,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(July 13, 1971)

Before COLEMAN, GOLDBERG, and DYER Circuit Judges.

COLEMAN, Circuit Judge: This appeal concerns the application of the Freedom of Information Act of 1966, 5 U.S.C., §552. The District Court granted summary judgment against James O. Evans, who was the plaintiff below and is the appellant here. We affirm.

Invoking the provisions of the Act, on May 1, 1969, James O. Evans filed suit against the Department of Transportation of the United States, seeking disclosure of letters allegedly written on a date somewhere about October, 1960, to the Federal Aviation Agency, referring to his capabilities as a commercial airline pilot. The complaint alleged that from 1941 until April 15, 1960, Evans was actively employed by Pan American World Airways, Inc., as co-pilot and captain. On April 15, 1960, Pan American discharged him "for reasons unspecified by the carrier". In October, 1960, *** "the Federal Aviation Agency received certain letters from a person or persons, or organization unknown to plaintiff, but which plaintiff upon information and belief alleges to be officials of Pan American World Airways, Inc., which said letters contained patently false and libelous allegations regarding plaintiff's mental fitness and abilities". As result, the Federal Aviation Agency summarily suspended plaintiff's medical certificate and required him to undergo psychiatric evaluation and testing. Upon completion of such procedure plaintiff's medical certificate was restored. [As a result of arbitration, Evans was also rehired by Pan American].

The complaint further alleged, on information and belief, that the officers and agents of Pan American had obtained the suspension of Evan's medical certificate by the use of the aforesaid letters and improperly advised the arbitrator of the psychiatric suspension and thereby materially and fraudulently prejudiced the arbitrator against plaintiff.

The remainder of the complaint recited Evans' repeatedly unsuccessful efforts to obtain disclosure of the identity of the letter writer, such efforts allegedly extending over a period beginning in 1962 and ending in 1968.

The Department of Transportation raised the affirmative defenses that the documents are exempt from disclosure under 5 U.S.C., §§552(b) (3), (b) (4), and (b) (7), as well as 49 U.S.C.. § 1504.

On October 2, 1970, the Department moved for summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure, asserting that there was no genuine issue of any material fact and that judgment should be entered for the Department as a matter of law. Attached to this motion was the affidavit of the Administrator of the Federal Aviation Agency, which stated, "I have determined that in my judgment a disclosure of those records and the information therein would adversely affect the interest of the writer of the letters and is not required in the interest of the public. 5 U.S.C., §§552 (b) (4), 552 (b) (7), and 49 U.S.C., §1504, and the regulations promulgated by the Secretary of Transportation, 49 C.F.R. §§7.59 (a) (2), 7.65".

The affidavit further stated that the letters to the Agency, sought by the plaintiff, described plaintiff's alleged problems of behavior disorder and mental abnormality as related to his qualifications to fly; that the first letter did not identify Evans, but asked what course the writer should follow to bring a pilot's overt acts of behavior disorder and mental adnormality to the attention of the proper officials, indicating the writer's concern about difficulties he might encounter if he named the pilot.

In response to that letter (continues the affidavit), the Chief Medical Officer of the Agency requested the writer to write directly to him and assured him, in specific language, that the letter would be kept confidential. In

response to this, the correspondent identified Evans by name and set forth in detail the reasons which prompted the writer to believe that Evans "might be too mentally ill to be allowed to fly as a commercial pilot". The Chief Medical Officer then assured the correspondent in writing that his effort to bring the matter to the attention of the Agency was appreciated and that his trust would not be violated.

The affidavit concluded with the statement that the letters sought by the plaintiff led to a complete investigation, instituted by the Agency, into the qualifications of the plaintiff to hold a pilot's certificate. The letters were made part of that investigatory file "for law enforcement purposes in the enforcement of its regulations".

The final summary judgment entered in the case on October 15, 1970, after an in-camera inspection of the letters, stated,

> "The Court finds that the material which plaintiff seeks to have disclosed is exempted from disclosure by 5 U.S.C. Section 522(b) (3) and 49 U.S.C. Section 1504.
>
> "The Court further finds that the material is also exempted from disclosure by 5 U.S.C. Section 552(b) (7).
>
> "Defendant's motion for summary judgment is granted, and this case is dismissed with prejudice."

This Court can well understand why Mr. Evans, almost eleven years after the event, as a matter of personal curiosity if nothing else, would pursue his avid search for the identity of the writer of the letters. We are likewise well aware of the critical importance of requiring that commercial airplanes be flown only by pilots who are in good health, both mentally and physically. Furthermore, the protection of the safety of the traveling public in this regard is entrusted by law to the Federal Aviation Agency. As a matter of common sense the efforts of this Agency to investigate and take appropriate action as to the mental and physical health of pilots would be seriously jeopardized if individuals could not confidentially call facts to the attention of the Agency which might affect the safety and lives of millions of passengers.

In our opinion, it was just such situations as the one now before us which prompted Congress to exempt from the terms of the Act "investigatory files compiled for law enforcement purposes" as set forth in 5 U.S.C., §552(b)(7).

We are of the further opinion that Congress could not possibly have intended that such letters should be disclosed once an investigation is completed. If this were so, and disclosure were made, it would soon become a matter of common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the Federal Aviation Agency of something which might justify investigation.

The desire of an individual to know the name of the person who wrote these letters over ten years ago is totally

submerged by the public interest, that is, the safety of millions of the general public who use airline transportation and who must depend upon the Federal Aviation Agency, by investigation and otherwise, to foster that safety. The investigatory functions of the Agency may not be crippled by a requirement not commanded by the statute, certainly not by a requirement specifically exempted by the statute.

We hold that these letters as a part of the investigatory files of the Federal Aviation Agency are exempt from disclosure under 5 U.S.C. §552(b)(7).[1]

We further hold, however, that a failure to disclose in this case is authorized by 5 U.S.C., §552(b)(3) and 49 U.S.C., §1504.

By Section 552(b)(3) matters that are specifically exempted from disclosure by statute are exempt from the terms of the Freedom of Information Act.

49 U.S.C. [Federal Aviation Program] § 1504, reads as follows:

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[1]The Senate Committee in its Report [S. Rep. 813, 89 Congress] stated:

"It is also necessary for the very operation of our Government to allow it to keep confidential certain material such as the investigatory files of the Federal Bureau of Investigation." Upon signing the proposed Act into law the President stated:

"A citizen must be able in confidence to complain to his Government and to provide information * * * * * I know the sponsors of this bill recognize these important interests and inted to provide for both the need of the public for access to information and the need of Government to protect certain categories of information."

"Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provision of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law; Provided, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress."

Before he would name the pilot in question, the letter writer required assurances of complete non-disclosure. The assurances were given. This was a running, permanent objection to the disclosure of the writer's identity and is within the provisions of Section 1504.

The judgment of the District Court is

AFFIRMED.

APPENDIX B

[TITLE OMITTED]

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

July 13, 1971

Issued as Mandate: Sep. 10, 1971

APPENDIX C

[TITLE OMITTED]

(Filed September 2, 1971)

ON PETITION FOR REHEARING

Before COLEMAN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 69-51-Civ-J

JAMES O. EVANS,

Plaintiff,

vs.

DEPARTMENT OF TRANSPORTATION
OF THE UNITED STATES,

Defendant.

ORDER AND JUDGMENT

This case was heard on October 13, 1970, on plaintiff's motion for rehearing, reconsideration, and to alter and amend judgment.

The Court has studied the pleadings, affidavits and memoranda of law on file, and has conducted an *in camera* inspection of the material which plaintiff seeks to have disclosed pursuant to the Freedom of information Act, 5 U.S.C. § 552.

Upon consideration, it is

ORDERED AND ADJUDGED:

1. The order entered herein on July 14, 1970, granting defendant's motion for summary judgment is superseded by this order.

2. The Court finds that the material which plaintiff disclosed pursuant to the Freedom of Information Act, U.S.C. § 552(b) (3) and 49 U.S.C. § 1504:

3. The Court further finds that the material is also exempted from disclosure by 5 U.S.C. § 552(b) (7).

4. Defendant's motion for summary judgment is granted, and this case is dismissed with prejudice.

DONE AND ENTERED at Jacksonville, Florida, this 15th day of October, 1970.

Original signed:

Wm. A. McRAE, Jr.

Judge

Copies to counsel

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 18 1972
E. ROBERT SEAVER, CLERK

No. 71-698

In the Supreme Court of the United States

OCTOBER TERM, 1971

JAMES O. EVANS, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
L. PATRICK GRAY, III,
Assistant Attorney General,
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OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (Pet. App. 1-7) is reported at 446 F. 2d 821.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1971, and a timely petition for rehearing was denied on September 2, 1971. The petition for a writ of certiorari was filed on November 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the identity of an informant, who supplied the Federal Aviation Administration with information about behavior disorder and mental abnormality of a certified commercial pilot, was exempt from disclosure to the pilot and public under the Freedom of Information Act by virtue of Section 1104 of the Federal Aviation Act of 1958.

2. Whether such information was also exempt from disclosure under the Freedom of Information Act by virtue of the Act's exemption of investigatory files.

STATUTES INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides:

> § 552. *Public information; agency rules, opinions, orders, records, and proceedings.*
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records

and to order the production of any agency records improperly withheld from the complaint. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

* * * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute;

* * * * *

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

* * * * *

2. Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. 1504, provides:

Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of

this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

STATEMENT

In October of 1960, as a result of certain letters received alleging behavior disorder and mental abnormality of petitioner, a commercial airline pilot, the Federal Aviation Administration ("FAA") suspended petitioner's medical certificate and required him to undergo psychiatric testing (Pet. App. 2). Upon the completion of the tests, petitioner's medical certificate was restored (*ibid*).

Petitioner filed this action under the Freedom of Information Act, 5 U.S.C. 552, to obtain from the FAA the letters which it had received (App. 1–5, 13–16).[1] Petitioner alleged that he had been discharged by Pan American World Airways on April 15, 1960. He alleged in essence that the damaging letters had been written to

[1] "App." refers to the Appendix to Briefs, which, together with the Record on Appeal, has been filed with the Clerk of this Court.

the FAA by some unknown officials of Pan Am in October of 1960 in order to engineer his medical suspension, which they then called to the attention of the arbitrator hearing petitioner's wrongful discharge claim (App. 1–3).

According to an affidavit opposing disclosure filed in this case by John H. Shaffer, Administrator of the FAA, the letters sought by the petitioner had been furnished to the FAA only after the informant had been assured that "how we obtained this information will not, in any way, be made available to the pilot" (App. 14–15). The Administrator stated that the letters were "furnished and accepted in confidence by the agency" and "led to a complete investigation, instituted by the agency, into the qualifications of the plaintiff to hold a pilot certificate" (App. 15). The Administrator also stated that the letters "were made part of that investigatory file compiled by this agency for law enforcement purposes in the enforcement of its regulations" (App. 15–16). Finally, the Administrator stated, in accordance with Section 1104 of the Federal Aviation Act, 49 U.S.C. 1504 (*supra*, p. 3), that disclosure of the letters "would adversely affect the interest of the writer of the letters and is not required in the interest of the public" (App. 13–14).

After an *in camera* inspection of the informant's letters, the district court granted summary judgment dismissing the action. The court ruled that the letters were exempted from disclosure under the Information Act as material exempted from disclosure by statute and as investigatory files (5 U.S.C. 552(b) (3) and

(7), *supra*, pp. 2–3) (Pet. App. 13–14). The court of appeals, after an *in camera* inspection of its own, unanimously affirmed on the same grounds (Pet. App. 1–7).

ARGUMENT

1. The court of appeals correctly held that the informant's letters were exempt from disclosure under the Act's exemption of matters "specifically exempted from disclosure by statute" (5 U.S.C. 552(b)(3)).[2] 49 U.S.C. 1504 provides such a specific exemption:

---

[2] In explaining this exemption, the House Committee on Government Operations noted that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160" (H. Rep. No. 1497, 89th Cong., 2d Sess., p. 10 (1966)). The Attorney General noted that a survey conducted by the Administrative Conference of the United States in 1962 "concluded that there were somewhat less than 100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, * * * or otherwise protect from disclosure. The reference [in the House Report] therefore indicates an intention to preserve whatever protection is afforded under other statutes, whatever their terms." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967), pp. 31–32. Accord: *Freedom of Information: The Statute and the Regulations*, 56 Geo. L.J. 18, 33–34 (1967). See also the statement of Senator Long, Chairman of the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure: "It should be made clear that this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies." Hearings on S. 1666 and S. 1663 (in part), Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure, 88th Cong., 1st Sess. (October 28, 1963), p. 6.

> Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. * * *

As the court of appeals stated (Pet. App. 7): "Before he would name the pilot in question, the letter writer required assurances of complete non-disclosure. The assurances were given. This was a running, permanent objection to the disclosure of the writer's identity and is within the provisions of Section 1504."

Petitioner contends (Pet. 16) that the FAA Administrator erred in concluding that disclosure of the letters would "adversely affect the interests" of the informant and that disclosure "is not required in the interest of the public". But the interests of the informant obviously would be adversely affected if his identity were to be disclosed to the pilot whom the informant caused to be subjected to official agency investigation into the pilot's qualifications to fly. Further, the public interest would be adversely affected since many people would be reluctant, or unwilling, to furnish the FAA with information if the agency could not honor its assur-

ances of confidential treatment. As the court of appeals stated (Pet. App. 5):

> We are * * * well aware of the critical importance of requiring that commercial airplanes be flown only by pilots who are in good health, both mentally and physically. Furthermore, the protection of the safety of the traveling public in this regard is entrusted by law to the Federal Aviation Agency. As a matter of common sense the efforts of this Agency to investigate and take appropriate action as to the mental and physical health of pilots would be seriously jeopardized if individuals could not confidentially call facts to the attention of the Agency which might affect the safety and lives of millions of passengers.[3]

2. The court of appeals also correctly held that the informant's letters fall within the exemption from disclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency".[4] 5 U.S.C.

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[3] There is nothing in the record to support petitioner's assertions that (*e.g.*, Pet. 7) his "discharge was sustained and Evans career as a pilot was ruined." According to the deposition of Mr. Schy, petitioner's attorney in the arbitration proceeding, the arbitrator found that Pan Am's charges were not "precise" and ordered Pan Am to file precise charges within a given time (Record on Appeal, Document No. 8, p. 24). Mr. Schy also stated that the arbitration award made no provision for the year in which petitioner's arbitration proceeding had been pending (*ibid.*).

[4] The exception to the exemption is not relevant here; it was merely designed to insure that private parties to whom material in an investigative file is available "by law" do not lose that entitlement by virtue of the exemption. Thus, for ex-

552(b)(7). As the court noted (Pet. App. 5), Congress enacted this exemption for the specific purpose, among others, of protecting the identity of informants. See 110 Cong. Rec. 17667–17668 (1964); Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 2d Sess., on S. 1663 (1964), pp. 103, 212, 389, 493, 679. Moreover, as the court further noted, "Congress could not possibly have intended"—as petitioner contends (Pet. 14)—that informants' letters "should be disclosed once an investigation is completed" (Pet. App. 5). Under petitioner's theory FBI files would no longer be exempt after the FBI investigation was completed, even though Congress intended to protect FBI files from disclosure. H. Rep. No. 1497, 89th Cong., 2d Sess., p. 2 (1966); S. Rep. No. 813, 89th Cong., 1st Sess., p. 3 (1965).

3. The court of appeals' alternative holding—that the "investigatory files" exemption covers an informant's letters after the close of the investigation—is not in conflict with the decision of any other court.[5] None of the

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ample, a defendant who is entitled under the Jencks Act to see an FBI report, does not lose that entitlement by virtue of the "investigatory files" exemption. See 110 Cong. Rec. 17667 (1964); *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967), p. 38; *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 593–594 (D. P.R.).

[5] *Wellford* v. *Hardin*, 444 F. 2d 21 (C.A. 4), held this exemption inapplicable to Department of Agriculture warning letters and reports of detention, which constituted "the written records of regulatory action already taken." 444 F. 2d at 24. *Bristol-Myers* v. *Federal Trade Commission*, 424 F. 2d 935

cases petitioner cited involved any question of the disclosure of the statements by or the identity of an informant.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.
L. PATRICK GRAY III,
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WALTER H. FLEISCHER,
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Attorneys.

JANUARY 1972.

(C.A. D.C.), held that an agency could not protect all its files by the simple expedient of labeling them "investigatory" with a suggestion that enforcement proceedings might be commenced at some unspecified future time (424 F. 2d at 939). *Getman* v. *National Labor Relations Board*, 40 U.S. Law Week 2126 (C.A.D.C.) (Pet. 15) held that the "investigatory files" exemption did not cover lists of employees eligible to vote in labor representation elections since the lists were not compiled for "law enforcement" purposes. *Cooney* v. *Sun Shipbuilding & Drydock Company*, 288 F. Supp. 708 (E.D. Pa.) (Pet. 14) held that the exemption covered statements of witnesses obtained during a government investigation.

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